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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/904,794	07/12/2001	Robert J. Germick	5468	1785

7590 03/31/2004

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EXAMINER	
WEINSTEIN, STEVEN L	

ART UNIT	PAPER NUMBER
1761	

DATE MAILED: 03/31/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	09/904,794	GERMICK ET AL.	
	Examiner	Art Unit	
	Steven L. Weinstein	1761	60

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☑ Responsive to communication(s) filed on 7/17/03 + 11/21/03

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☑ Claim(s) 1-7,10-29,31 is/are pending in the application.

4a) Of the above claim(s) 1-7,10-20 is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☑ Claim(s) 21-29,31 is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date 1/15/2002, 1/22/02, 6/30/03
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

Applicant's traverse, filed 11/21/03, to the restriction requirement, mailed 8/26/03, has been fully and carefully considered but is not found to be convincing. The traverse is based on the urging that there would be no serious burden in examining all of the claims together. The MPEP state that for purposes of the initial requirement, a serious burden on the examiner may be prima facie shown if the examiner shows ether separate classification, separate status in the art or a different filed of search. The restriction required mailed 8/20/03 shows this. Applicant urges that each Group has some connection to the other Group. This is true for almost all cases of restrictable inventions. It is extremely rare to have a situation where two groups of claims are presented which have no connection to each other such as a group claiming a process of microwave cooking and a group claiming an MRI apparatus. The restriction requirement clearly points out how the groups are separate and distinct. As for the urging that all three classes would need to be searched for all three groups, this is just not true. Even if a search was conducted in all three classes, a particular Group could and usually does require additional classes and differing subclasses to be searched that would differ from that of a different Group selected. Finally, even if a search was conducted of all three groups, each group presents different issues, which would still require a different search in the sense of what one was looking for in terms of primary and secondary references. The restriction is therefore made FINAL. Accordingly, claims 1-7 and 10-20 are withdrawn from further consideration as being drawn to non-elected inventions.

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 21, 22, 23,24, 29, and 30 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Friedman (2,313, 060).

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 23 and 24 are rejected under 35 U.S.C. 103(a) as being unpatentable over Friedman (2,313,060) in view of French et al (6,004,606) and Stanley et al (3,129,673).

Friedman discloses a method of providing a food item wherein a flowable food product is flowed through a fill tube and a food ingredient is introduced into the food product via a supply tube located inside the fill tube. Claim 23 recites that the supply tube has an end opening located "generally adjacent" to an inside surface of the fill tube. It is noted that "generally adjacent" is, at best, a general term of no real clarity as to how close the opening of the supply tube comes to the fill tube. Also, it is not clear what the effect of this specific structural detail has in a method claim. In any case, both French et al and Stanley et al, who, like applicant and like Friedman, are directed to the problem of providing composite products, teach that it is well established in the art to provide the end of a supply tube with various shapes or configurations and provide the end opening of the supply tube near the outer tube containing the main product. To modify Friedman, if indeed Friedman does not clearly teach this recitation, and provide this spatial relationship is seen to have been an obvious matter of design and an obvious function of the visual result of the composite desired.

Claim 31 is rejected under 35 U.S.C. 103(a) as being unpatentable over Friedman (2,313,060) in view of Kinney (4,136,720), Gundlach et al (2,284,651), French et al (6,284,294), and Mannara (3,952,782).

Claim 31 differs from Friedman in the recitation that the entry point is in the form of a duct in the supply tube at an acute angle upstream of the supply tube. It is again not clear what effect this structural limitation has on the method claim. It is also not clear that the claim as written, positively recites how the acute angle is determined since the angle is not clearly related to a surface. Any acute angle also defines an obtuse angle. "Upstream" of the supply tube is not seen to clarify acute versus obtuse. In any case, to expedite prosecution, based on applicants figure, it would appear that the duct makes an acute angle with the vertical axis of the supply tube, with the acute angle opening upwardly. Kinney, Gundlach, French and Mannara all disclose points of entry for an ingredient upwardly from the bottom of the supply tube wherein the points of entry can be either ducts or even just an opening in the supply tube (e.g. Mannara). The art taken as a whole even disclose orientations for the point of entry that vary from downwardly i.e. in the direction of product flow (e.g. Friedman) to an orientation wherein the ingredient flows against the direction of product flow (e.g. Kinney). To modify Friedman and change the configuration of the point of entry from one conventional configuration to another conventional configuration for its art recognized and applicants intended function is seen to have been obvious.

Claims 25-28 are rejected under 35 U.S.C. 103(a) as being unpatentable over Friedman (2,313,060) in view of Kinney (4, 136,720) and Kinney et al (3,886,973).

Claim 25 differs from Friedman in the recitation that the flowable food product is a cultured dairy product and specifically yogurt (claim 27). As evidenced by the two Kinney et al references, which, like Friedman and like applicant, disclose composite products, it was well established to mix and form two composite products wherein yogurt is involved. Thus, the two Kinney references teach the equivalent of frozen food products and yogurt. To modify Friedman and form a composite food product including yogurt would therefore have been obvious. In regard to claims 26 and 27, the art taken as a whole teach composites of different colors which would contain different food colorings. Applicant is not the inventor of carminic acid, a known food colorant with known properties, and to employ the additive for its art recognized and applicant's intended function at a particular working pH would have been an obvious routine determination, if indeed it is not already recognized. Similarly, the particular viscosity of yogurt (claim 28) is seen to have been an obvious matter of routine determination, especially where it was well recognized that composite products should be viscous to prevent mixing.

The remainder of the references cited on the USPTO 892 forms are cited as pertinent art.

Any inquiry concerning this communication from the examiner should be directed to Steven Weinstein whose telephone number is (571) 272-1410. The examiner can generally be reached on Monday-Friday 7:00am to 3:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application is assigned is (703) 872-9306.

Any inquiry of a general nature or relating to the status of this application should be directed to the receptionist whose telephone number is (571) 272-1201.

STEVE WEINSTEIN
PRIMARY EXAMINER
3/24/04

1761